

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of OSP Communications LLC and John Vogel, an individual, to determine whether OSP Communications LLC and John Vogel have violated the Laws, Rules and Regulations of this State in the Provision of Operator and Calling Card Services to California Consumers; and Whether the Billing Resource LLC, a Delaware Corporation, and The Billing Resource LLC d/b/a Integretel, a California Corporation should Refund and Disgorge All monies billed and collected on behalf of OSP Communications LLC.

Investigation 11-05-028
(Filed May 26, 2011)

**DECISION DENYING MOTION OF THE SAFETY AND ENFORCEMENT
DIVISION REQUESTING ORDER TO SHOW CAUSE AND GRANTING JOINT
MOTION OF THE BILLING RESOURCE LLC AND THE SAFETY AND
ENFORCEMENT DIVISION FOR APPROVAL OF A SETTLEMENT**

Summary

We deny the motion of the Commission's Safety and Enforcement Division (SED) for an order to show cause why the Commission should not order The Billing Resource d/b/a Integretel, The Billing Resource LLC, (TBR), Pacific Bell Telephone Company d/b/a AT&T Communications of California (U1001C) (AT&T) and Verizon California, Inc. (U1002C) (Verizon) to issue refunds to customers who were billed for unauthorized charges placed on their phone bills by OSP Communications LLC (OSP) and impose penalties or other sanctions.

We grant the joint motion of TBR and SED for approval of a settlement agreement. This proceeding is closed.

1. Background and Procedural History

OSP Communications LLC (OSP) is an alleged provider of collect call services in California and nationwide. OSP operated in California from approximately June 2007 through June 2009 and billed California consumers for purported collect calls totaling about \$8.1 million, of which approximately \$2.4 million has been refunded to California consumers who complained to OSP, its billing agents, or the Commission. During its operations, OSP used the billing and collection services of billing agents, The Billing Resource LLC d/b/a Integretel (Integretel or Old TBR) and The Billing Resource LLC (TBR or New TBR), to facilitate the placement of OSP's collect call charges onto California consumers' local telephone bills. Most of the California consumers charged for OSP's purported collect calls were subscribers of AT&T Communications of California (U1001C) (AT&T) and Verizon California, Inc. (U1002C) (Verizon).

On May 26, 2011, the Commission on its own motion issued an Order Instituting Investigation (OII), (I.) 11-05-028, to determine whether OSP caused unauthorized charges for collect calls to be placed on California consumers' local telephone bills. The practice of placing unauthorized charges on phone bills is known as "cramming" and is prohibited by Public Utilities (Pub. Util.) Code § 2980.3. The Commission also sought to determine whether OSP provided prepaid calling card service without Commission authorization. The Commission instituted the investigation based on the Commission's Safety and Enforcement Division (SED) Staff Report that presented, among other things, the following evidence:

- 12,857 cramming complaints collectively lodged to OSP's billing agents and the Commission concerning OSP's collect call charges;
- a high refund rate for OSP charges, averaging 35% and reaching as high as 53%;
- the inability of either AT&T or Verizon to match their internal call records (aka "switch records") with the call records OSP produced to its billing agents for billing and collection of the collect calls California consumers purportedly made through OSP; and
- TBR terminated its billing and collection services for OSP after investigating OSP's billings and finding that the billings and transactions processed by OSP were invalid and likely fraudulent.

From this evidence, SED inferred that OSP provided erroneous call records to its billing agents for its billings and consequently caused California consumers to be billed for collect calls that allegedly never took place in apparent violation of § 2890. In the OII, the Commission agreed with SED's inference and accordingly provided Respondents, OSP and Mr. Vogel an opportunity to appear before the Commission and show cause why they should not be fined nor have any other sanctions imposed as a result of the alleged cramming. (OII at 22-23.)

With respect to violations against Respondents, OSP and Mr. Vogel, the Commission sought to determine through its investigation whether:

- a. Respondents violated Pub. Util. Code § 2890 by causing charges to be placed on consumers' bills for products or services which the consumers did not request or authorize;
- b. OSP violated Pub. Util. Code § 451 by placing unjust or unreasonable charges on consumers' telephone bills;
- c. OSP violated Pub. Util. Code § 885 by offering prepaid calling cards in California without Commission authorization;

- d. OSP violated Pub. Util. Code §§ 270, 431-435, 702, 739, 879, and 2881 for its failure to remit regulatory fees and surcharges on intrastate revenue for the prepaid calling cards; and
- e. Mr. Vogel is an alter ego of Respondent, OSP or so directed and authorized the acts alleged by Staff, such that his personal liability is equitable and appropriate. (OII at 28.) On August 8, 2011 OSP and Mr. Vogel filed a Response to the OII denying the allegations in the OII and Staff Report and alleging that any cramming that may have taken place may have been committed by TBR. Respondents also denied offering prepaid calling cards and claimed that OSP merely advertised its collect call services on prepaid calling cards. As part of the OII, in addition to Respondents, OSP and Mr. Vogel, the Commission also named OSP's billing agents, Integretel and TBR, as Relief Respondents to determine whether all of these Respondents should be ordered pursuant to §§ 734 and 2889.9 to return funds retained from any of OSP's alleged unauthorized billings, as well as to disgorge all proceeds retained from OSP's alleged unauthorized billings.

The Commission stated the investigation would consider whether, pursuant to §§ 701, 734, and 1702 of the Public Utilities Code, any of the following remedies are warranted:

- a. Respondents, including Relief Respondents, be ordered to disgorge all profits obtained illegally, and pay reparations, restitution, and/or refunds, pursuant to Pub. Util. Code § 734, to California consumers in the total amount collected from them for OSP's collect call services and related charges, where consumers had not knowingly authorized the services or the amounts charged;
- b. Respondents be fined pursuant to Pub. Util. Code §§ 2107 and 2108 for the above-described violations of the Public Utilities Code and related Orders, Decisions, Rules, directions, demands and requirements of this Commission; and/or;

- c. Respondent, Vogel be permanently enjoined from billing customers, either directly or through an intermediary, by placing any charges on any telephone bill. This injunction would also run against any business or operation Respondent, Mr. Vogel currently owns or operates as well as any future endeavors. (OII at 29.)

To preserve the Commission's authority pursuant to § 734 to order refunds to aggrieved customers, the Commission ordered Integretel and TBR to place all monies they collected on behalf of OSP into an escrow or trust account pending resolution of I.11-05-028. TBR complied and placed the \$1.1 million it had been holding as reserves into an escrow account. TBR contends that Integretel is still holding significant reserves relating to OSP, amounting to approximately \$1.2 million.

In September 2007, Integretel filed a voluntary petition for a Chapter 11 Bankruptcy (United States Bankruptcy Court for the Northern District of California, San Jose Division, Case No. 07-52890-ASW).

On June 22, 2011, mCapital, LLC and CardinalPointe Capital Group, LLC (collectively "mCapital") filed a motion for party status. mCapital alleges that it has a direct financial interest in the outcome of this proceeding. It claims that it has rights in certain monies presently in possession of Relief Respondent TBR because those monies are the proceeds of OSP's accounts that mCapital allegedly purchased from OSP. On July 13, 2011, the Administrative Law Judge (ALJ) granted mCapital party status. In addition to this proceeding, mCapital has asserted the same claim regarding the approximately \$1.1 million of OSP reserves being held by TBR in an escrow account in San Diego Superior Court, Case No. 37-2010-00100830-CU-BC-CTL, filed September 22, 2010.

mCapital sued OSP, Mr. Vogel, and TBR for, among other things, breach of contract relating to the OSP funds in TBR's possession. According to the

complaint, the plaintiffs had previously purchased from OSP all of its telecommunications accounts and therefore allege that all of OSP's revenues belong to them. TBR denied owing any monies to mCapital with respect to OSP's funds it held in reserve. On February 29, 2012, the San Diego Superior Court entered a judgment for mCapital against OSP and Mr. Vogel in the amount of \$2,399,988.28. The matter against TBR was submitted to arbitration and is still pending. The San Diego Superior Court stayed the rest of the action pending the outcome of the Commission's investigation.

On September 21, 2011 the ALJ held a prehearing conference (PHC) where the parties agreed upon a procedural schedule and the issues to be addressed in this proceeding. On September 29, 2011, the assigned Commissioner and ALJ issued a scoping memo adopting the issues set forth in the OII as those to be litigated through evidentiary hearings (EHs) on March 26-29, 2012. However, after all the parties indicated their interest in pursuing mediation, the ALJ delayed the EHs to allow the parties to negotiate and document a settlement. The parties did not submit testimony pursuant to the agreed-upon schedule in hopes of reaching an all-party settlement. On February 21, 2012, all of the parties, except Integretel (SED, OSP, Mr. Vogel, TBR, and mCapital) participated in mediation with an agreed-upon neutral mediator, ALJ Jean Vieth. Mediation was unsuccessful.

Subsequently, SED, Vogel and OSP began further settlement negotiations, which culminated in the execution of a settlement agreement (OSP Settlement Agreement). TBR, AT&T and Verizon were not parties to the OSP Settlement Agreement. On September 5, 2013, the Commission issued Decision (D.) 13-09-001 approving the OSP Settlement Agreement, dismissing mCapital as a party, and leaving the proceeding open to determine the appropriate method

for issuing the refunds ordered in the decision and to allow SED time to pursue recovery of sums held by third parties for the benefit of consumers harmed by the actions of respondents.

No further action was taken in this matter until February 2, 2015 when SED filed the motion to show cause which is a subject matter of this decision. AT&T, Verizon and TBR filed timely responses to the SED motion. TBR's response included a motion to release TBR's escrow funds to itself and to be released as a relief respondent pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure. On July 14, 2015, the ALJ issued a Proposed Decision (PD) denying SED's Motion and granting the TBR Motion. On August 10, 2015, SED filed comments opposing the PD. On August 24, 2015, TBR, AT&T, and Verizon filed separate reply comments in support of the PD.

On October 30, 2015 SED and TBR filed a joint motion for approval of a settlement agreement (TBR Settlement Agreement). The proposed decision issued for comment in July 14, 2015 was withdrawn and this decision addresses both SED's pending Motion and the Settlement. On November 30, 2015, AT&T and Verizon filed responses to the settlement motion. On December 15, 2015, SED and TBR filed replies to the AT&T and Verizon responses.

2. Discussion

2.1. SED's Motion for a Show Cause Order

SED advances two separate legal theories for holding the billing agents and the billing telephone companies liable for the amounts OSP allegedly crammed onto customer bills, vicarious liability and strict liability. Under a vicarious liability theory, TBR is liable for the crammed charges even though there is no finding of wrongdoing by TBR in this record, because it either knew or should have known that OSP was placing unauthorized charges on customer

bills and profited from its handling of those charges on OSP's behalf. Under a strict liability theory, the billing telephone companies are liable under applicable statutes and Commission rules that impose strict liability on them, no matter who placed the unauthorized charges on customer bills.

The problem with the vicarious liability theory is straightforward: in order to hold a secondary party liable for the wrongdoing of a primary party, there must be an adjudicated finding of wrongdoing by the primary party. Although SED's motion and the accompanying declaration of Victor Banuelos lay out in great detail the investigative findings that provided the basis for issuing the original OII, the OSP Settlement Agreement disclaims any wrongdoing by either OSP or its owner and alter ego, John Vogel. In D.13-09-001 the Commission made no finding of wrongdoing by either OSP or Vogel; to the contrary, the OSP Settlement Agreement approved in that decision is explicit that neither of them admits to any wrongdoing. In short, SED has not proven that OSP crammed customer phone bills nor has OSP admitted that it did. There being no proof of wrongdoing by the primary party (OSP or Vogel) there can be no vicarious liability on the part of a secondary party (Integretel or TBR).

SED's strict liability theory fares no better. AT&T and Verizon can't be held liable, strictly or otherwise, for accusations; they can only be held liable for proven or admitted violations. In the absence of proven or admitted violations, neither of these parties can be required to pay anything.

To summarize, in the absence of proven or admitted violations, neither the billing agents nor the billing telephone companies are liable for the charges that OSP allegedly placed on subscribers' bills. In view of this conclusion, we find it unnecessary to address other defenses advanced by the respondents such as

denial of due process, laches and conflict with settlements reached in federal class actions.

2.2. The Joint Motion of SED and TBR for Approval of a Settlement Agreement

The proposed TBR Settlement Agreement is intended to fully resolve all issues raised in the OII and the SED and TBR Motions with respect to Relief Respondent TBR. By voluntarily entering into the Settlement Agreement, TBR denies engaging in unfair, fraudulent or unlawful business practices. TBR, however, has no evidence to dispute the conclusion in SED's Staff Report and the OII that all of OSP's collect call charges were unauthorized in violation of Public Utilities Code Section 2890, as set forth in Exhibit 1 ("Stipulated Facts") to the Settlement Agreement.

The proposed TBR Settlement Agreement has two key components:

1. Disbursement of Funds held in Escrow by TBR Pursuant to OII (Escrow Funds)

Based on TBR's representations that the Escrow Funds, held by TBR in Citibank Account No. XXXXXX0332, totaling \$1,096,709.11 as of September 31, 2015, are comprised of payments from customers nationwide who were billed for OSP charges, that approximately one-third of the Escrow Funds were collected from California customers, and that the remaining approximately two-thirds of the Escrow Funds were collected from customers in other states, SED and TBR agree that the \$1,096,709.11 total amount in Citibank Escrow Account No. XXXXXX0332, as of September 31, 2015, shall be apportioned and disbursed within seven (7) calendar days from CPUC Approval of the Agreement using the following methodology:

- a. 33.0915% (\$362,917.50) paid to the Commission to be held in trust and escrow pending the Commission's

disposition of SED's Order to Show Cause motion. California's \$362,917.50 share from the Escrow Account shall be considered disgorged funds that were collected from unauthorized OSP billings. TBR shall make this payment within 7 days of the approval of the settlement, in the form of a check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102. TBR shall write on the face of the check or money order "For deposit to a CPUC trust account, per **Decision XX-XX-XXX]."**

- b. 66.9085 % (\$733,791.61) released to TBR consistent with TBR's rights and obligations pursuant to its Master Services Agreement with OSP.

2. Admission and Acknowledgement of TBR

TBR admits that it has no evidence to refute the OII's preliminary findings that all of OSP's billing records were fraudulent and the OII's resulting conclusion that all of OSP's collect call charges in California were unauthorized, in violation of Public Utilities Code Section 2890. TBR acknowledges that, based on its own investigation, it believed all of the billing records OSP provided to TBR were invalid and therefore fraudulent.

3. Applicable Rules and Required Findings

Rule 12(d) of the Commission's Rules of Practice and Procedure (Rules) requires that any settlement be "reasonable in light of the whole record, consistent with law, and in the public interest." As discussed below, we find that the settlement meets these requirements.

Moreover, as the United States Court of Appeals for the Ninth Circuit has observed, in evaluating a settlement, that the agreement must stand or fall on its own terms, not compared to some hypothetical result that the negotiators might have achieved, or that some believe should have been achieved:

Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion. (*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).)

Based upon our review of the record, we find that the parties to the TBR Settlement Agreement had a sound and thorough understanding of the issues and all of the underlying assumptions and data included in the record. Thus, we can consider the TBR Settlement Agreement as the outcome of negotiations between competent and well-prepared parties able to make informed choices in the settlement process.

Rule 12.1 specifically addresses the requirements for adoption of proposed settlements, subject to certain limitations in Rule 12.5. Specifically, Rule 12.1(a) states:

Parties may, by written motion any time after the first prehearing conference and within 30 days after the last day of hearing, propose settlements on the resolution of any material issue of law or fact or on a mutually agreeable outcome to the proceeding. Settlements need not be joined by all parties; however, settlements in applications must be signed by the applicant and, in complaints, by the complainant and defendant.

The motion shall contain a statement of the factual and legal considerations adequate to advise the Commission of the scope of the settlement and of the grounds on which adoption is urged. Resolution shall be limited to the issues in that proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings.

When a settlement pertains to a proceeding under a Rate Case Plan or other proceeding in which a comparison exhibit would ordinarily be filed, the motion must be supported by a comparison exhibit indicating the impact of the settlement in

relation to the utility's application and, if the participating staff supports the settlement, in relation to the issues staff contested, or would have contested, in a hearing.

Rule 12.1(d) provides that:

The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

Rule 12.5 limits the future applicability of a settlement:

Commission adoption of a settlement is binding on all parties to the proceeding in which the settlement is proposed. Unless the Commission expressly provides otherwise, such adoption does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

Based upon our review of the settlement documents we find that they contain statements of the factual and legal considerations adequate to advise the Commission of the scope of the TBR Settlement Agreement and of the grounds for its adoption; that the TBR Settlement Agreement was limited to the issues in this proceeding; that the TBR Settlement Agreement included a comparison indicating the impact of the settlement in relation to contested issues raised by the interested parties in prepared testimony, or which they would have contested in a hearing; and that pursuant to Rule 12.5, that the TBR Settlement Agreement would not bind or otherwise impose a precedent in this or any future proceeding.

Accordingly, we conclude, pursuant to Rule 12.1(d), that the TBR Settlement Agreement is reasonable in light of the whole record, consistent with law, and in the public interest and should be approved.

4. Proceeding Category and Need for Hearing

The OII categorized this Investigation as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings.

Because of the settlement between SED and Respondents and the denial of SED's motion for a show cause order, the evidentiary determination is changed to state that evidentiary hearings are not necessary.

5. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure.

Comments were received from the parties as noted in the procedural history above and discussed below. In view of the unusual procedural history of this proceeding, this revised version of the proposed decision was circulated for an additional round of comments. "Comments were received from the Commission's Safety and Enforcement Division (SED), from Pacific Bell Telephone Company (AT&T) and from Verizon California (Verizon). SED's comments repeated arguments previously rejected and were given no additional weight. Verizon's comments and AT&T's comments supported the Proposed Decision with no suggested changes."

On August 10, 2015 SED filed comments on the PD mailed for comment in July 2015. These comments were amended by an additional filing on August 17, 2015. In its comments, SED objects to the PD on various grounds that may be briefly summarized as follows:

1. The PD errs in finding that neither the billing agents nor the billing telephone companies are liable for unauthorized charges allegedly placed on customer phone bills by OSP and Vogel.

2. The PD errs in finding that escrowed funds should be returned to TBR and TBR should be released from the proceeding as a Relief Respondent.

As to the first alleged error, with regard to the billing agents, SED's investigation, on which the original complaint was based, found evidence of wrongdoing by OSP and Vogel sufficient to constitute a *prima facie* case of cramming against them. But the SED investigation did not constitute a *prima facie* case of cramming against the billing agents; indeed, the record establishes that the only billing agent remaining in the case, TBR, was diligent in ceasing to place charges on customer accounts when it discovered that the charges being submitted by OSP and Vogel were likely fraudulent. TBR remains in the case solely because, as directed by the Commission, it is holding in excess of \$1 million in payments received from customers for services that were allegedly never rendered.

As to the billing telephone companies, they could potentially be held vicariously liable for cramming by OSP and Vogel if OSP and Vogel were found to be crammers. But the OSP Settlement Agreement explicitly relieves both OSP and Vogel of any liability for cramming. Alternatively, the billing telephone companies could be held strictly liable for any unauthorized charges placed on customer bills. That has been the rule since we adopted Rule 10 of General Order (GO) 168 in 2010 in D.10-10-034. But the alleged cramming in this case took place between 2007 and 2009, before the issuance of D.10-10-034.

In its amended comments SED argues that our analysis of Rule 10 is erroneous and that the Rule merely codified an existing Commission practice of holding billing telephone companies strictly liable for cramming. According to SED, billing telephone companies have been strictly liable for unauthorized charges on customer bills since 2001, when the legislature adopted Section 2890

of the PU Code, which provides that “A telephone bill may only contain charges for products or services the purchase of which the subscriber has authorized.”

We disagree. The plain language of Section 2890(c) makes it clear that the crammer is responsible for refunding the crammed charge:

“If an entity responsible for generating a charge on a telephone bill receives a complaint from a subscriber that the subscriber did not authorize the purchase of the product or service associated with the charge, **the entity**, not later than 30 days from the date on which the complaint is received, shall verify the subscriber’s authorization of that charge or undertake to resolve the billing dispute to the subscriber’s satisfaction.” [Emphasis supplied.]

Dissatisfaction with this approach to the handling of cramming charges led to the anti-cramming provisions of GO 168, adopted in 2006 by D.06-06-013. The responsibilities of billing telephone companies with respect to claims of unauthorized charges were set out in Rule 5 of GO 168:

The Billing Telephone Corporation has an affirmative duty to investigate Subscriber allegations of unauthorized billings, and where there are reasonable grounds of concern that a pattern of unauthorized charges may have occurred, to take the initiative to determine whether other Subscribers may have been subjected to unauthorized charges.

Resolution of cramming complaints was covered in Rule 8:

If a Billing Telephone Corporation or Billing Agent receives a complaint that the Subscriber did not authorize the purchase of the product or service associated with a charge, the Billing Telephone Corporation or Billing Agent, whichever is the recipient of the complaint, not later than 30 days from the date on which the complaint is received, shall either (i) verify and advise the Subscriber of authorization of the disputed charge or (ii) credit the disputed charge and any associated late charges or penalties to the Subscriber’s bill...

However, Rule 8 covers only the resolution of individual complaints received by the billing telephone company or billing agent, as the case may be, and the inadequacy of this remedy when dealing with wholesale cramming of customer accounts led to the 2010 amendments to GO 168 including the new Rule 10:

The Billing Telephone Corporation is ultimately responsible for refunding all unauthorized charges collected from its Subscribers, **including those Subscribers who may have mistakenly paid the unauthorized charges and not requested a refund.** Every Billing Telephone Corporation and Billing Agent shall maintain accurate and up-to-date records of all billings and Service Providers sufficient to demonstrate compliance with these rules and to facilitate customer refunds. Such records shall be retained for no less than twenty-four months. [Emphasis supplied.]

It is clear from this history that the billing telephone companies acquired strict liability for refunding all unauthorized charges, including those for which no refund was requested, only in 2010 with the adoption of Rule 10. Since Rule 10 had not been adopted at the time the alleged cramming in this case took place, the billing telephone companies were liable only for resolving the complaints that they actually received, in the manner established by Rule 8.

The second alleged error is mooted by the settlement which we approve today.

6. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Karl J. Bemederfer is the assigned ALJ in this proceeding.

Findings of Fact

1. As of September 30, 2015, TBR held in escrow \$1,096,709.11, representing wrongful charges placed on Verizon or AT&T customer telephone accounts by OSP.

2. 66.9085% (\$733,791.61) represents amounts wrongfully charged to the accounts of non-California customers of Verizon or AT&T.

3. Cramming of customer telephone bills has neither been admitted by nor proven against any respondent in this proceeding.

Conclusions of Law

1. In the absence of proven or admitted wrongdoing by a primary party, a secondary party cannot be held vicariously liable.

2. TBR is not liable for the alleged cramming by OPS.

3. AT&T and Verizon are not liable for the alleged cramming by OSP.

4. The TBR Settlement Agreement is reasonable in light of the whole record, consistent with law, and in the public interest and should be approved.

O R D E R

IT IS ORDERED that:

1. The motion of the Safety and Enforcement Division for an Order to Show Cause is denied.

2. The Settlement Agreement is attached to this decision as Attachment A.

3. Within seven days of the effective date of this order, The Billing Resource LLC may release to itself \$733,791.61 currently held in escrow in accordance with the terms of the Settlement Agreement in Attachment A.

4. Within seven days of the effective date of this order, The Billing Resource LLC shall make a payment of \$362,917.50 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102. The Billing Resource LLC shall write on the face of the check or money order "For deposit to a CPUC trust account per **Decision xx-xx-xxx.**"

5. Verizon California Inc., and Pacific Bell Telephone Company and the Safety and Enforcement Division shall jointly develop a program to identify and reimburse customers wrongly billed by OSP Communications LLP.

6. Any funds remaining in the Commission trust account in Ordering Paragraph 4 after the diligent efforts by Safety and Enforcement Division to locate and reimburse wrongly charged customers shall escheat to the General Fund of the State of California after 24 months.

7. Investigation 11-05-028 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

ATTACHMENT A
(Settlement Agreement)

**SETTLEMENT AGREEMENT BETWEEN
THE SAFETY AND ENFORCEMENT DIVISION AND THE BILLING
RESOURCE LLC, A DELAWARE CORPORATION IN RESOLUTION OF DISPUTED
MATTERS IN CALIFORNIA PUBLIC UTILITIES COMMISSON
INVESTIGATION 11-05-028**

This Settlement Agreement (“Agreement”) is hereby entered into by and between the Safety and Enforcement Division (“SED”)¹ of the California Public Utilities Commission (“Commission” or “CPUC”) and The Billing Resource LLC, a Delaware-based limited liability company (“TBR”) its successor, affiliates, and assigns and sets forth the following terms of the settlement of (1) the Commission’s Order Instituting Investigation 11-05-028 (“OII”) as against TBR, (2) SED’s February 5, 2015 Motion for an Order to Show Cause (“SED Motion”) as against TBR only, and (3) TBR’s April 23, 2015 Motion requesting dismissal of TBR as a party to the OII and release of the escrow funds to the possession of TBR and TBR’s June 17, 2015 re-filed Motion requesting release of the escrow funds to the possession of TBR (“TBR Motions”). All of the above-mentioned parties are sometimes individually referred to as “Party” and/or collectively referred to as “the Parties.”

RECITALS

- A. On May 26, 2011, the Commission issued the OII to determine whether OSP Communications, LLC (“OSP”) and its alleged owner John Vogel (“Vogel”) violated Public Utilities Code Section 2890 or any Commission rule, regulation, order, requirement, or other state law by allegedly placing unauthorized collect call charges on California consumer telephone bills.² The practice of placing unauthorized charges on phone bills is known as “cramming” and is prohibited by Section 2890.
- B. The OII also names The Billing Resource LLC (“TBR”), a Delaware-based limited liability company, and The Billing Resource, Inc. d/b/a Integretel (“Integretel”), a California corporation, as “Relief Respondents” with respect to the charges

¹ SED was formerly known as the Consumer Protection and Safety Division (“CPSD”).

² Hereinafter, all section references are to the Public Utilities Code unless otherwise specified.

they billed and collected on behalf of OSP. OSP charges were placed on approximately 737,000 California customers ("Affected Customers") telephone bills. The OII directed TBR and IntegreTel to place all monies in its possession related to any OSP charges in an interest-bearing escrow or trust account pending resolution of this Investigation. TBR placed approximately \$1.1 million in an escrow account, which represents all monies TBR had been holding in a reserve account for OSP-related charges as of approximately May 26, 2011.

- C. The OII stated that the Commission would consider whether any of the following remedies are warranted against the named Respondents in I.11-05-028:
- a. Respondents, including Relief Respondents, be ordered to disgorge all profits obtained illegally, and pay reparations, restitution, and/or refunds, pursuant to P.U. Code § 734, to California consumers in the total amount collected from them for OSP's collect call services and related charges, where consumers had not knowingly authorized the services or the amounts charged; and
 - b. Respondents be fined pursuant to P.U. Code §§ 2107 and 2108 for the above-described violations of the Public Utilities Code and related Orders, Decisions, Rules, directions, demands and requirements of this Commission.
- D. In Decision (D.)13-09-001, the Commission approved a settlement between SED and Respondents OSP and Vogel. The settlement requires OSP and Vogel to pay penalties of \$2,785,400 and \$200,000, respectively. Pursuant to D.13-09-001, OSP shall also "make full reparation to California consumers of the \$8.1 million for collect call charges that were allegedly neither authorized nor received during the period of June 1, 2007 through June 3, 2009, of which \$2.4 million has already been refunded. Such refunds shall be paid within six months of the date on which the Commission sets a refund methodology."³ In or around June 2009, OSP ceased operating, and it is unlikely that OSP will ever pay the \$8.1 million in reparations. On February 5, 2013, John Vogel filed for Chapter 11 Bankruptcy, *In re John G. Vogel & Rita A Vogel*, USBC Case No. 4:13-bk-00960-BMW.
- E. SED and TBR have stipulated to certain facts regarding the OII ("Stipulated Facts"), which Stipulated Facts are attached as **Exhibit 1** to this Agreement. On the basis of these Stipulated Facts, and of the terms agreed to by the Parties in this Agreement, the Parties believe that this Agreement represents a fair

³ D.13-09-001, Ordering Paragraph (OP) 4, at 23.

resolution of all matters in the OII *as they relate to TBR only*, SED's Motion *as it relates to TBR only*, and TBR's Motions, and it is in the public interest for the Commission to approve this Agreement.

NOW THEREFORE, in consideration of the foregoing and based upon the mutual promises and representations made by the Parties to each other, the Parties hereby agree as follows:

TERMS OF SETTLEMENT

1. **Disbursement of Funds held in Escrow by TBR Pursuant to OII ("Escrow Funds"):** Based on TBR's representations that the Escrow Funds, held by TBR in Citibank Account No. XXXXXX0332, totaling \$1,096,709.11 as of September 31, 2015, are comprised of payments from customers nationwide who were billed for OSP charges, that approximately one-third of the Escrow Funds were collected from California customers, and that the remaining approximately two-thirds of the Escrow Funds were collected from customers in other states, SED and TBR agree that the \$1,096,709.11 total amount in Citibank Escrow Account No. XXXXXX0332, as of September 31, 2015, shall be apportioned and disbursed within seven (7) calendar days from CPUC Approval of the Agreement using the following methodology:

- a. 33.0915% (\$362,917.50) paid to the Commission to be held in trust and escrow pending the Commission's determination, as requested in the SED Motion, as to whether OSP's Billing Telephone Corporations AT&T and Verizon will be required to: (1) issue refunds for OSP-related charges, disgorging in the process all payments for unauthorized charges received as part of OSP's scheme, and (2) pay a penalty or face other sanctions ordered by the Commission. Notwithstanding the Commission's determination of these issues, California's \$362,917.50 share from the Escrow Account shall be considered disgorged funds that were collected from unauthorized OSP billings.

TBR shall make this payment within 7 days of the approval of this settlement, in the form of a check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102. TBR shall write on the face of the check or money order "For deposit to a CPUC trust account, per Decision [XX-XX-XXX]."

- b. 66.9085 % (\$733,791.61) released to TBR consistent with TBR's rights and obligations pursuant to its Master Services Agreement with OSP.

2. **Admissions:** TBR does not have any evidence to refute the OII's preliminary findings that all of OSP's billing records were fraudulent and the OII's resulting conclusion that all of OSP's collect call charges in California were unauthorized, in violation of Public Utilities Code Section 2890.⁴ TBR acknowledges, based on its own investigation, that it believed all of the billing records that OSP provided to TBR were invalid and therefore fraudulent.

General Terms

3. **Commission Approval of the Agreement.** SED and TBR agree to cooperate and use their respective best efforts to promptly file a joint Motion for Approval of Settlement at the Commission. After signing this Agreement, the Parties shall actively support prompt approval of the Agreement, including briefing, comments on any proposed decision, appearances, and other means as may be needed to obtain approval of the Commission.
4. **Settlement and Release:** This Agreement represents a full and final resolution of the OII and the matters giving rise thereto, as between the Parties, with regard to potential claims, penalties, enforcement actions or investigations relating to OSP-generated charges for the period June 1, 2007 through June 3, 2009.⁵ In particular, SED releases TBR and its directors, officers, employees, agents, attorneys, successors, and assigns from all claims and liabilities arising out of the OII issues. If the Commission does not approve this Agreement in full, it (including the Stipulated Facts) shall have no force and effect, except to the extent set forth in Paragraph 11 (Severability/Commission Modification of the Agreement).
5. **No Admission of Liability.** The Parties agree that by entering into this Agreement, TBR does not admit to any violations of law. Neither this Agreement nor any payment of a sum of money or other actions taken pursuant to this Agreement shall constitute or be deemed or construed as an admission of liability, or guilt, on the part of any Party to this Agreement.

⁴ See e.g., OII at 22-23.

⁵ TBR provided billing services on behalf of OSP for a 9-month period beginning in October 2008 through June 2009. Prior to October 2008, billing services on behalf of OSP were provided by Integretel.

6. **Jurisdiction:** The Commission has jurisdiction over the Parties and subject matter of this Agreement and authority to enforce this Agreement.
7. **Enforcement of this Agreement.** The Parties and their counsel agree to fully cooperate with each other to accomplish the terms of this Agreement in an expeditious manner. The CPUC shall retain continuing jurisdiction over this matter for the term of the Agreement, including jurisdiction to enforce the terms of this Agreement. In the event of a breach, any Party to this Agreement may move the Commission to enforce this Agreement; however, before filing such motion, the moving Party shall meet and confer with all the Parties in a good faith attempt to resolve the issue without Commission intervention.
8. **Term of Agreement:** The terms of this Agreement shall have been satisfied when both of the following occur: (1) the Commission approves this Agreement and (2) the CPUC has received from TBR \$326,917.50 (representing 33.0915% of the Escrow Funds) pursuant to the terms in Paragraph 1.
9. **Final Agreement/Intent of Parties.** This Agreement embodies the entire understanding of the Parties with respect to the matters described herein and supersedes any and all prior oral or written agreements, principles, negotiations, statements or understandings among the Parties. The Agreement may be amended only by a written agreement signed by all the Parties. The Parties have bargained in good faith to achieve this Agreement. Each of the Parties has contributed to the preparation of this Agreement. Accordingly, the Parties agree that no provision of the Agreement shall be construed as against any party because that party or its counsel drafted the provision.
10. **Governing Law.** This Agreement shall be governed by the laws of the State of California.
11. **Severability/Commission Modification of the Agreement.** No individual term of this Agreement is agreed to by any Party except in consideration of the Parties' assent to all other terms. Thus, the Agreement is indivisible and each part is interdependent on each and all other parts. Any Party may withdraw from this Agreement if the Commission fails to approve, or modifies, deletes from or adds to the disposition of the matters stipulated herein. The Parties agree, however, to negotiate in good faith with regard to any Commission-ordered changes in order to restore the balance of benefits and burdens, and to exercise the right to withdraw only if such negotiations are unsuccessful.
12. **Successor and Assigns.** The rights conferred and obligations imposed on any Party by this Agreement shall inure to the benefit of or be binding on that Party's

successors in interest or assignees as if such successor or assignee were itself a party hereto.

13. **Authority to Execute Agreement.** The undersigned acknowledge and covenant that they have been duly authorized to execute this Agreement on behalf of their respective principals and that each execution is made within the course and scope of their respective agency or employment.

14. **Counterparts.** This Agreement may be executed in counterparts with the same effect as if all Parties had signed one and the same document. All such counterparts shall be deemed to be original and shall together constitute one and the same Agreement.

IN WITNESS WHEREOF, the Parties hereby execute this Settlement Agreement on the date first set forth opposite their signature.

DATED: _____ SAFETY AND ENFORCEMENT DIVISION, CPUC

By: _____

JEANETTE LO
Chief, Utility Enforcement Branch

DATED: _____ THE BILLING RESOURCE, LLC

By: _____

NELSON GROSS
Managing Member, TBR

(END OF ATTACHMENT A)